Nos. 20643 and 20644

IN THE

United States Court of Appeals

For the Ninth Circuit

1965 TERM

GILA RIVER RANCH, INC., a corporation and RUSSELL BADLEY, and CELESTE BADLEY,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 20643

GILA RIVER RANCH, INC., a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 20644

Appeal from the United States District Court for the District of Arizona

BRIEF OF APPELLANT GILA RIVER RANCH, INC.

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Appeal from the United States District Court for the District of Arizona

BRIEF OF APPELLANT GILA RIVER RANCH, INC.

This appeal involves two condemnation cases brought by the United States to condemn flood easements in a total of 18,945.29 acres of land lying under the "Painted Rock" Flood Control Dam as constructed and maintained by the United States on the Gila River north and west of Gila Bend, Arizona.

Case #3586 involved 18,866.50 acres of land and Case #4571, 78.79 acres. Only defendant Gila River Ranch was

involved as an owner in Case #4571. In Case #3586 appellants Russell Badley and Celeste Badley, his wife, were also involved as owners of approximately 640 acres of land. All acreage was contiguous and part of one large parcel of land. The trial judge ordered that the cases be consolidated for trial but separate verdicts were rendered as to each case and separate judgments entered as to each case.

JURISDICTIONAL STATEMENT.

In each case, the complaint which was filed by the United States Attorney alleged:

> "The authority for the taking is the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U.S.C. 258a), and acts supplementary thereto and amendatory thereof, and under the further authority of the Acts of Congress approved April 24, 1888 (25 Stat. 94, 33 U.S.C. 591) and March 1, 1917 (39 Stat. 948, 33 U.S.C. 701) which authorize the acquisition of land for flood control projects; the Act of Congress approved May 17, 1950 (Public Law 516 — 81st Congress), which act authorizes the construction of Painted Rock Dam and Reservoir in the Gila River Basin, Maricopa County, Arizona; and the Act of Congress approved September 2, 1960 (Public Law 86 — 700), which act appropriated funds for such purposes." (Cause #4571 contains the identical allegations with the above except that in the last three lines the words "September 2, 1960 (Public Law 86 — 700)" are changed to read "October 24, 1962 (Public Law 87 — 880)."

Gila River Ranch entered its appearance in each case and did not seriously challenge the jurisdiction of the District Court as alleged.

The defendants, Badley, filed their appearance during the trial of the causes and did not challenge the jurisdiction of the District Court.

The cases were tried to a jury, verdicts returned, judgments thereon entered, Motions for a New Trial were filed by the

United States and ruled upon by the District Judge. These motions were denied conditioned upon defendants' entering remittiturs in each case. Written remittiturs were executed, submitted to the trial judge for approval and approved and ordered filed by the trial judge.

Thereafter the United States proposed the entry of new judgments "on remittitur" in each case. Defendants objected thereto but the trial judge on November 16, 1965 overruled the objections, signed and entered new judgments and denied the Motions of the United States for a New Trial in each case.

Thereupon defendant Gila River Ranch on December 3, 1965 in each case filed its Notice of Appeal, Bond for Costs on Appeal and perfected this appeal.

Jurisdiction in this Court is conferred by 28 U.S.C.A. Sec. 1291.

STATEMENT OF QUESTIONS INVOLVED ON THESE APPEALS

In the main, one question is presented upon this appeal which requires for a satisfactory answer, answers to several sub-questions.

The main question presented is — "What is the jurisdiction and power of a federal district judge to revise a judgment entered upon a jury verdict after such judgment is signed by the District Judge and entered by the Clerk in the Civil Docket?"

The facts which give rise to this main question and the subsidiary questions hereafter stated, all of which arose after the judgment on the jury's verdict in each case was entered and the Motions for a New Trial were filed by the Government as to each case were as follows.

The Motions for a New Trial, filed by the United States, claimed various erroneous rulings by the trial judge and asserted

the claims that the verdict in each case was excessive. After briefs were filed and oral arguments heard by the trial judge the Court filed a "Memo Decision" (Tr. 14) in which the Court found the verdict in cause #3586 excessive by $125,000.00 and in cause #4571 by $800.00 and ordered

> "If the defendant landowner, within 30 days from filing of this opinion, will file a stipulation to accept judgments on the verdicts in the two cases reduced by the above amounts, then the motion for new trial will be denied, otherwise the motion will be granted."

Within this thirty day period the landowner filed a remittitur in each case (Tr. 43) (Tr. 46) which

(a) Recited the pertinent portions of the judgment theretofore entered in that cause;

(b) Recited the pertinent parts of the order from the "Memo Decision" on the Motion for New Trial;

(c) Concluded with the statement:

> "And said defendants and their attorneys further show that they desire to make remittitur (as to cause #3586) of $125,000.00 of such judgment.
>
> "Wherefore, they and each of them do hereby release unto the United States of America, plaintiff, the sum of $125,000.00 of such judgment."

This was followed by the Court's approval:

"ORDER

> "On this day in the above entitled cause came GILA RIVER RANCH, INC. and RUSSELL BADLEY and CELESTE BADLEY, defendants, by their attorneys of record, SNELL & WILMER, and having submitted to the Court for its approval remittitur of judgment and the Court having heard and con-

sidered the same and it appearing to the Court that said remittitur of judgment is in all respects fair, reasonable and just and should be made,

"Now upon motion of counsel it is:

"ORDERED, ADJUDGED and DECREED that said remittitur of judgment be and the same is hereby in all respects approved and confirmed by the Court and the Clerk is ordered to receive, accept and file the same herein.

"DATED at Aguna Guam, this 13th day of July, 1965.

(signed) Charles L. Powell
United States District Judge"

This order was signed by Judge Powell July 13, 1965 and returned to and entered filed by the Clerk.

Thereafter the United States filed a "Motion for Judgment" in each case to which was attached a proposed "Judgment on Remittitur."

This proposed new judgment reduced the judgment originally entered by $153,125.00 rather than the $125,000 agreed to by the landowners in cause #3586.

The reduction in cause #4571 above the $800 was insubstantial for reasons not material to a decision in this case.

Defendant Gila River Ranch promptly objected to these Motions for Judgment and to the entry thereof and challenged the power and jurisdiction of the District Court to amend and vacate the judgments entered on the verdicts and enter new judgments (Tr. 55, 56, 57, 58, 59, 60).

Thereafter and on November 16, 1965 Judge Powell overruled the Objection to the Motions for Judgment of the United States and signed and forwarded for entry the new "Judgments

on Remittitur" and formally overruled the Motions for a New Trial of the United States (Tr. 75 through 84).

These appeals were thereupon taken.

SUBSIDIARY QUESTION 1.

"Considered in the light of the constitutional guaranty of a jury trial as contained in the Seventh Amendment to the Constitution of the United States, does a judge of a United States District Court in a civil cause tried to a jury have the power to reject a clearly expressed limitation contained in a remittitur filed pursuant to an order of such court on a Motion for a New Trial conditioning denial of such Motion upon the filing of a remittitur and enter a judgment for an amount less than the jury's award and also less than the reduction in the award and the judgment entered thereon agreed to by the remitting party?"

SUBSIDIARY QUESTION 2.

"After a judgment upon a jury's verdict in a civil case tried in a United States District Court has been signed by the District Judge and filed and entered by the Clerk of the Court does such District Judge have the jurisdiction to thereafter, over the objection of a party to such judgment, vacate and open the original judgment and sign a new and different judgment and cause such new judgment to be entered by the Clerk?"

Appellant asserted that the answer to each of the above two questions must be in the negative by challenging the jurisdiction and power of the District Judge in the Court below to enter new judgments under the circumstances of this case as hereinabove indicated.

SPECIFICATION OF ERRORS RELIED UPON

I. The District Judge erred in opening and vacating the judgments entered upon the jury's verdicts and in signing and causing

new and different judgments to be entered over this appellant's objections for the reason that a United States District Court Judge has no power or jurisdiction to open and vacate a judgment entered upon a jury's verdict for the purpose of signing and causing the entry by the Clerk of a materially different judgment from the jury's verdict and the judgment entered thereon, absent all parties' express agreement thereto.

II. The District Judge erred in opening and vacating the judgments originally entered upon the jury's verdicts and in signing a new judgment and causing the same to be entered by the Clerk of the Court which new judgment effects a reduction and change in the original judgments entered upon the jury's verdict greater than and different from the reduction and change agreed to in a remittitur filed by the party thereto adversely affected thereby for the reason such judicial action denies the party affected thereby a trial by jury in contravention of the Seventh Amendment to the United States Constitution.

III. The District Judge erred in vacating and opening the judgments entered on the jury's verdicts and entering new and different judgments for the reason Rule 58(a), Federal Rules of Civil Procedure, only allows such action by the trial court in a case tried to the Court without a jury, and thereby impliedly denies such authority to the Court in a case tried to a jury.

CONCISE STATEMENT OF THE CASE

Since this appeal presents two narrow questions and the facts giving rise to this appeal have already been adequately stated, appellant will not here restate the facts or offer a further summary.

THE SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION QUESTION

Perhaps a better way to express the question posed by this phase of this appeal is to state yet another question. It is:

"Does a United States District Judge have the power to decrease the amount of a judgment entered upon a jury's verdict beyond and in excess of the amount of decrease expressly agreed to by the party in whose favor the judgment runs through the device of entering a new judgment 'on remittitur' which judgment, over the objection of the remitting party, increases the amount remitted over that agreed to in the remittitur?"

To state the question is to state the answer.

The interest allowed in a judgment entered on a jury's verdict in a case where immediate possession has been taken by the United States is as much a part of the "just compensation" awarded by the judgment as the dollar amount fixed by the jury.

In *Bishop v. United States,* 288 F.2d 525 (1961) the Fifth Circuit stated the rule clearly:

> "While, in this problem, we deal with a statute, the statute is one which has constitutional overtones, and it is to be read in this light. The Declaration of Taking Act 'does not bestow independent authority to condemn lands for public lands. On the contrary, it provides a proceeding "ancillary or incidental to suits brought under other statutes," Catlin v. United States, * * (324 U.S. [229] at 240 [65 S.Ct. 631, at page 637, 89 L.Ed 911]).' United States v. Dow, 1958, 357 U.S. 17, at page 23, 78 S.Ct. 1039, at page 1045, 2 L.Ed.2d 1109; In re United States, 5 Cir., 1958, 257 F.2d 844, 847. By the time of its enactment in 1931, the doctrine was unquestioned that interest was a part of just compensation not, as in a damage suit, a mere payment for delay. 'Where the United States condemns and takes possession of land before * * * paying compensation, the owner is not limited to the value of the property at the time of taking; he is entitled to such addition as will produce the full equivalent of that value, paid contemporaneously with the taking. Interest at a proper rate is a good measure by which to ascertain the amount so to be added.' This is so because the compensation must be 'the full and perfect equivalent of the property taken.' Seaboard Airline Railway Co. v. United States,

1923, 261 U.S. 299, 304, 306, 43 S.Ct. 354, 356, 67 L.Ed. 664. Citing this case specifically, the Court reiterated this in the broadcast of terms. 'The Fifth Amendment of the Constitution provides that private property shall not be taken for public use without just compensation. Such compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken.' United States v. Miller, 1943, 317 U.S. 369, 373 and note 9, 63 S.Ct. 276, 279, 87 L.Ed. 336.

"This Act is a mechanism by which to facilitate the exercise of the sovereign's power of eminent domain and give full practical protection to both Government and owner alike. It could not have been intended to whittle down the property owner's rights for 'interest from the date of taking is usually a part of just compensation to be paid and cannot be denied by statute.' Atlantic Coast Line R. Co. v. United States, 5 Cir., 1943, 132 F.2d 959, 962. 'The purpose of the statute is two-fold. First, to give the Government immediate possession of the property and to relieve it of the burden of interest accruing on the sum deposited from the date of taking to the date of judgment in the eminent domain proceeding. Secondly, to give the former owner, if his title is clear, *immediate cash compensation to the extent of the Government's estimate of the value of the property.* * *' United States v. Miller, supra, 317 U.S. at page 381, 63 S.Ct. at page 283. *The objective of the latter is to give 'the owner the immediate use of cash approximating the value of his land.' 317 U.S. 381, 63 S.Ct. 284*

"Congress did not, by word 'deposit' in § 258a, note 1, supra, mean that the Constitutional mandate of just compensation would be satisfied by the mere act of delivering cash to some depository. It contemplates a transfer of funds for the effectual withdrawal and use by the former owner of the property taken. Unless that were so, it could not constitute a 'payment * * of estimated compensation * * *' or 'a payment "on account of" compensation,' 317 U.S. at page 381, 63 S.Ct. at page 284." (Emphasis supplied)

When the judgments were entered upon the jury's verdicts the "just compensation" to which the landowners were entitled became settled and liquidated. It consisted of

(a) The value of the easement taken by the judgment;

(b) The value of possession and use of the property taken between the date of taking and the date of the judgments vesting title in the United States. Use of the money deposited by the United States as "estimated compensation" during this period of possession without title constitutes just compensation for this use.

The judgments entered merged all components making up the judgment and the judgment then became the measure of the landowners' rights. *Restatement of the Law,* "Judgments," Sec. 47.

The order of the Court upon the Motions for a New Trial of the United States was ambiguous, at best. While the Court speaks of reducing the "verdicts" in each case by specified amounts in the order, the Court requires that landowner "file a stipulation to accept judgments on the verdicts *reduced by the above amounts*" if a new trial is to be denied. (Tr. 40, 41, 42).

As above indicated the remittiturs filed in each case recite and expressly refer to:

(a) The judgments entered upon the jury's verdict;

(b) The order of the Court requiring that a remittitur be filed or a new trial ordered including the exact terminology thereof.

Defendants then, expressly agree and stipulate:

"* * * they, and each of them, *do hereby release unto the United States of America,* plaintiff, the sum of $125,000 ($800 as to cause #4571) *of such judgment.*" (Emphasis supplied)

These remittiturs, plainly calling attention to the judgments entered on the jury's verdicts and the language of Judge Powell's Order and plainly spelling out how defendants understood the Court's Order and *what they agreed to,* were submitted to Judge Powell and he, by written Order, found:

> "* * * said remittitur of judgment is *in all respects* fair, reasonable and just * * *"

and the Court further in each case

> "ORDERED, ADJUDGED AND DECREED that said remittitur of judgment be and the same is hereby in all respects approved and confirmed by the Court and the Clerk is ordered to receive, accept and file the same herein." (Tr. 45, 48)

Thereafter the United States filed "Motions for Judgment" to which were attached proposed forms of "Judgment on Remittitur" and the Court after considering the written objections of the defendants granted these and signed and caused to be entered the "Judgments on Remittitur" enlarging the consent and remission of just compensation complained of on these appeals.

Defendants read *O'Brien v. Hobart,* C.A. 1, 1957, 249 F.2d 654, as supporting the remittiturs filed. The United States says we misread *O'Brien.* Reappraisal of *O'Brien* in the light of the Government's contention raises a question in defendant's mind if *O'Brien* was correctly read by us.

This is wholly beside the point. What caused defendants to agree to this reduction in the judgments as stated in the remittiturs is wholly immaterial. The fact is that *all defendants agreed to* was a reduction in the judgment in cause #3586 of $125,000 and in cause #4571 of $800. This cannot be gainsaid if the English language be given its normal and accepted meaning.

Certainly when it is recognized that in cause #4571 the United States had deposited as "estimated just compensation at the outset of the litigation when possession was taken the sum of $7850.00 and the jury had awarded only the sum of $6400.00, defendants cannot be blamed if they read the Court's Order as requiring no more than a forgiveness of only $800. This would make a total final award below the Government's original estimate of just compensation in 1963 of $2250.00.

Likewise the Government, in cause #3586, had, after verdict and judgment but before Judge Powell's ruling on the Motions for a New Trial, estimated the "just compensation" due defendant at the full amount of the judgment and paid this sum into Court.

Judge Powell was apparently more "sold" on the fact the verdicts were excessive than was the United States; and certainly the defendants, under these circumstances, cannot be blamed if they received Judge Powell's decision finding the verdicts excessive with a degree of incredulity.

Be that as it may, the jurisdiction of a District Judge to order a remittitur and effect a reduction in a judgment entered on a jury's verdict rests upon the consent of the parties to the litigation; otherwise the Court's action contravenes the Seventh Amendment to the Federal Constitution.

Moore's Federal Practice, 2d Ed. Vol. 6, Par. 59.05(3)

Becker Bros. v. U.S., 7 F.2d 3 (C.A.2)

The Arkansas Valley Land and Cattle Co. v. Mann, 130 U.S. 69, 9 S.Ct. 458, 32 L.Ed. 854

Dimick v. Schiedt, 293 U.S. 474, 55 S.Ct. 296, 79 L.Ed. 603

De Pinto v. Provident Security Life Insurance Co., C.A. 9, 323 F.2d 826.

THE RULE 58, FEDERAL RULES OF CIVIL PROCEDURE QUESTION

Rule 58, Federal Rules of Civil Procedure, provides, in part:

"On a motion for a new trial *in an action tried without a jury* the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment."

That a United States District Court and the judges thereof have a limited, statutory jurisdiction is too well settled to require citation of authority.

Leary v. U.S., 268 F.2d 623, C.A.9

Modern Federal Practice Digest, Key 255, *"Courts"*

The only basis for the action of the District Judge in signing and causing the entry of new judgments in each of these causes was the "Motion for Judgment" (Tr. 51, 52, 53, 54) of the United States. No rule is cited or other procedural precedent referred to as justifying this novel procedure. The remittiturs filed by defendants released from the existing judgment — remitted from the filed judgments expressly identified therein — specified amounts. Nowhere did defendants consent expressly or impliedly to any change in the judgments entered upon the jury's verdicts *other than by satisfying each such judgment to the extent specified in each remittitur.*

The error of the District Judge is patent.

CONCLUSION

Appellant respectfully requests that the "Judgments on Remittitur" in each cause be vacated and held void for the reasons above stated.

Respectfully submitted,

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I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

.....
Attorney